

Was the *Dujail* Trial Fair?

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Abstract

The Dujail trial against eight persons accused of crimes against humanity was intended as the first of fourteen trials; it was seen as a quick and simple case that would enable the Tribunal to develop its skills outside the limelight. The trial was in fact a missed opportunity in the search for Iraqi justice. It fell short in three notable ways: (i) it was severely compromised by political interference: lack of judicial independence, linked to the absence of a culture of respect for the fairness and impartiality of the judicial process, was the greatest failing of the trial; (ii) there were breaches in fair trial standards at the trial and appellate level; (iii) due to evidentiary and analytical gaps, the trial did not expose the full extent of crimes committed by the deposed regime; much of the judgment hinged on inference and stretched notions of liability. The Dujail trial was better than previous (and current) Iraqi trials. But that was not enough to meet minimum fair trial guarantees.

1. Introduction

The *Dujail* trial was many things: a political spectacle, a new attempt at Iraqi justice, and, after the implementation of sentencing, an ill-fated symbol of sectarian revenge. The trial included eight accused, the rotation of at least six judges, and three very different courtrooms: that of Rizgar Muhammad Amin, courteous but disastrously unpopular; that of the brisk and brusque Ra'uf Abd al-Rahman and, finally, that of the domineering Ali al-Kahaji. Between the time investigations began in 2004 and the cassation chamber verdict of 2006, the country outside had lapsed into intense conflict. Three defence lawyers and multiple tribunal staff and their close relatives had been killed. Dujaili victims, witnesses and their families had suffered multiple retributive attacks.¹

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1 Based on discussions with select Dujail witnesses and an official witness liaison.

It is tempting to ask whether the *Dujail* trial was worth it: whether all the effort, money and lives poured into it by the United States, the Iraqis and other international advisers were justified. But that is an unanswerable question, at least in the short term. A better question at this time is whether the *Dujail* trial fulfilled its judicial task: to credibly render individual accountability for the alleged crimes, and thus contribute to justice for victims and the future rule of law. A key element of credibility is fairness, that is, whether the trial met standards of fairness defined by international human rights law and its own governing statute. Did the *Dujail* trial meet the minimum fair trial guarantees contained in Article 14 of the International Covenant on Civil and Political Rights² and enshrined in Article 19 of the Iraqi High Tribunal (IHT) statute?³

The answer is no. The *Dujail* trial was a missed opportunity in the search for Iraqi justice. At great personal risk the IHT trial chamber judges attempted to deliver justice at a new and ambitious standard for Iraq. But the trial fell short in three notable ways. First, it was severely compromised by political interference. Second, there were breaches in fair trial standards at the trial and appellate level. Third, due to evidentiary and analytical gaps, the *Dujail* trial did not expose the full extent of crimes committed. Much of the judgment hinged on inference and stretched notions of liability. The *Dujail* trial was better than previous (and current) Iraqi trials. That is worth a great deal. But there is still a long way to go.

2. Background: The Iraqi High Tribunal

Iraqi violations of human rights and international humanitarian law⁴ figured prominently in public statements leading up to the US-led invasion of 2003. US

- 2 Art. 14(3) International Covenant on Civil and Political Rights, 16 December 1966, S. EXEC. DOC. E, 95–2 (1978), 999 U.N.T.S. 171 (1978) (hereinafter: ICCPR), available at: <http://www.ohchr.org/english/law/pdf/ccpr.pdf> (visited 22 February 2007). Iraq ratified the ICCPR on 23 March 1976.
- 3 This article includes the accused's presumed innocence (19(2)), entitlement to a public hearing (19(3)) and such minimum guarantees of a fair impartial trial (19(4)) as: being promptly informed of the content, nature and cause of the charge against him (4a); having adequate time and facilities to prepare his defence and to communicate freely with counsel of his own choosing (4b) as well as being tried in his own presence (4d). Law of the Supreme Iraqi Criminal Tribunal (Law No. 10 of 2005) *Official Gazette of the Republic of Iraq* (18 October 2005) (hereinafter: IHT Statute). An English translation of the statute is available online at: <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>. The Tribunal's name was changed from the Iraq Special Tribunal to the Supreme Iraqi Criminal Tribunal in October 2005; the Tribunal uses the English name 'Iraqi High Tribunal' (IHT).
- 4 Violations of international human rights and international humanitarian law (IHL) were extensively documented by a number of groups, including in particular the United Nations Special Rapporteur on the Human Rights Situation in Iraq, Amnesty International and Human Rights Watch. Examples include: UN Commission on Human Rights Res. E/CN.4/RES/1991/67, 'Situation of human rights in Kuwait under Iraqi occupation'; Middle East Watch, *Human Rights in Iraq* (New Haven: Yale University Press, 1990); Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq And Its Aftermath* (New York: Human Rights Watch, 1992);

officials repeatedly emphasized the need to hold Hussein and other Ba'ath leaders accountable for these violations.⁵ The then-US Ambassador for war crimes announced before the fall of Baghdad that the United States intended to institute an 'Iraqi-led' prosecutorial process.⁶ But although the Iraqi Special Tribunal of December 2003 was an American creation,⁷ there was also strong and genuine Iraqi appetite for accountability for the crimes of the former regime.⁸

The IHT has jurisdiction to try Iraqis and Iraqi residents for crimes against humanity, war crimes and genocide.⁹ It also has jurisdiction over some political offences enacted after the 1958 revolution not based on international legal norms.¹⁰ The Iraqi parliament incorporated an amended Tribunal statute and rules of procedure and evidence in August 2005.¹¹ The Tribunal's new legal framework was gazetted just one day before the opening of the *Dujail* trial on 19 October 2005.

UN GA Res. A/49/651, 'Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of Human Rights in Iraq', 8 November 1994 (and subsequent years); Amnesty International, *Iraq: Victims of Systematic Repression*, MDE 14/010/99, 24 November 1999.

- 5 See e.g. President George W. Bush, Remarks at the United Nation's General Assembly (12 September 2002) available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>, President George W. Bush, State of the Union (28 January 2003) available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> (visited 22 February 2007).
- 6 See US Department of Defense Briefing, 'Geneva Convention, EPW's and War Crimes', 7 April 2003, available at www.defenselink.mil/transcripts/2003/t04072003.t407genv.html (visited 22 February 2007). Pre-war planning included a possible Tribunal for high-level perpetrators of international legal crimes, with the assumption that lower-level perpetrators would be tried in ordinary Iraqi courts. Report of the Working Group on Transitional Justice in Iraq and the Iraqi Jurists' Association, *Transitional Justice in Post-Saddam Iraq: The Road to Re-Establishing Rule of Law and Restoring Civil Society, A Blueprint*, March 2003, copy on file at the ICTJ.
- 7 CPA Order 48, Delegation of Authority Regarding an Iraqi Special Tribunal, available at www.iraqcoalition.org/regulations/20040628.CPAORD.100.Transition.of.Laws.Regulations.Orders.and.Directives.pdf (English) and <http://www.iraqcoalition.org/arabic/regulations/20031210.CPAORD48.IST.and.Appendix.A..Arabic..pdf> (Arabic) (visited 22 February 2007).
- 8 International Center for Transitional Justice, *Iraqi Voices: Attitudes towards Transitional Justice and Social Reconstruction*, May 2004, available at www.ictj.org/mena/iraq.asp (English) or www.ictj.org/arabic/report.html (Arabic) (visited 22 February 2007).
- 9 See IHT Statute, *supra* note 3, Arts 11–13. Iraq ratified the Geneva Conventions on 14 February 1956, and acceded to the Convention on the Prevention and Punishment of the Crime of Genocide on 20 January 1959.
- 10 Crimes include attempts to manipulate the judiciary, pursuit of policies leading to war against another Arab country, and others drawn from Law 7 of 1958. The Special Supreme Military Court, chaired by Col. Fadil al-Mahdawi, was created immediately after the Iraq revolution of 1958 to try officials of the former regime. The Commander in Chief of the Armed Forces referred cases for investigation and trial. The court was an essential legitimator and mouthpiece for the new regime. B. Shwadran, *The Power Struggle in Iraq* (New York: Council for Middle Eastern Affairs Press, 1960), 60–74.
- 11 See IHT Statute, *supra* note 3.

The *Dujail* court tried eight accused of crimes against humanity.¹² The facts concerned an attack on the villagers of al-Dujail. In response to an alleged assassination attempt against the presidential motorcade on 8 July 1982, hundreds of villagers were detained, tortured, killed and exiled. Those released from exile five years later returned to find their lands and livelihoods destroyed. The *Dujail* trial was intended as the first of 14 trials, seen as a quick and simple case that would enable the Tribunal to develop its skills outside the limelight.¹³ But the Tribunal lost this opportunity when Saddam Hussein was added to the case shortly before its opening.¹⁴ The political sensitivity of the case was reinforced by an alleged connection between events in Dujail and the Ba'ath regime's persecution of the al-Dawa party, a leading Shi'a political party of which the current and previous Iraqi prime ministers are both members.¹⁵

3. Analysis of the Trial

It was clear at *Dujail's* outset that IHT judges intended to set a new standard for Iraqi justice, one procedurally and substantively fairer than that of the previous regime. So did their foreign supporters.¹⁶ This was obvious from the Tribunal's legal framework, as well as the judges' personal and

- 12 On trial were Saddam Hussein and three high-level cohorts who had allegedly participated in the attack, including the former head of the intelligence services (Barzan Ibrahim al-Hassan al-Tikriti), the former chief judge of the Revolutionary Court (Awwad Hamd al-Bandar) and the former vice-president and head of the popular army (Taha Yassin Ramadan). The four lower-level defendants (Abd Allah al-Ruwaid, Ali Dayih Ali, Mizher al-Ruwaid, and Muhammad Azzawi Ali) were residents of al-Dujail.
- 13 Other cases investigated include: the Anfal campaign (currently at trial); the 1991 uprising in southern Iraq (the Tribunal has announced the investigation is complete); the persecution of religious political parties; the persecution of secular political parties; the invasion and occupation of Kuwait; the execution of merchants in 1992; the Arab marshes and others.
- 14 For a more detailed discussion of case selection see ICTJ Briefing Paper, *The Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, October/November 2005, at 18–19.
- 15 Prime Minister Ibrahim al-Ja'afari held office at the trials opening in October 2005, and Prime Minister Nuri al-Maliki held office for the rest of the proceedings.
- 16 All IHT functions with the exception of trial chamber and cassation judges rely heavily on the Regime Crimes Liaison Office (RCLO). The RCLO is based at the US embassy and is formally mandated to provide the Tribunal with analytical, logistical and investigative support. It is comprised mostly of US personnel. The UK has played a productive role in the Tribunal's development within the limits required by its opposition to the death penalty. There were also a small number of independent international advisers to the trial chamber and the defence. The US has contributed some \$128 million in funding, which dwarfs the Tribunal's own budget. It also facilitates extensive security arrangements for Tribunal and associated personnel. See J.B. Bellinger, III, Press Release, US Department of State, 'Supporting Justice and Accountability in Iraq', speech delivered at Chatham House, London on 9 February 2006, available at <http://www.state.gov/s/rls/rls/61110.htm>; see also US Department of State, *Section 2207 Report on Iraq Relief and Reconstruction, Spending Plan Table (Status of Funds)*, October 2006, available at <http://www.state.gov/documents/organization/77367.pdf> (stating funds used for Investigations of Crimes Against Humanity total \$128 million).

professional behaviour.¹⁷ But the previous Iraqi justice system was appalling: the IHT was working from a very low base line.¹⁸ Even a substantial improvement was not enough to meet international standards. It was unrealistic to expect the *Dujail* trial to conform fully to international standards without additional insulation from domestic pressures and broader external assistance.¹⁹ The result is that the *Dujail* trial did not deliver adequate justice.

A. Challenges to Independence and Impartiality

All persons are entitled to a fair and public hearing by a competent, impartial and independent tribunal.²⁰ Many doubted the IHT could ever meet these requirements. Established by a delegation of power from the Coalition Provisional Authority, the legality of the IHT's establishment has been domestically and internationally controversial, and its independence has been widely questioned. Although many argued that the technical question of the legality of the Tribunal's establishment was answered when the statute was adopted by the Iraqi Parliament, perception problems remain.²¹ These questions have been discussed extensively elsewhere and will not be addressed here.²²

The greatest failing of the *Dujail* trial was lack of judicial independence, linked to the absence of a culture of respect for the fairness and impartiality

17 The IHT's legal framework, though faulty, is heavily based on international legal norms; those norms were eroded in parliamentary revisions to the statute in 2005. The language of Art. 14 of the International Covenant on Civil and Political Rights was substantially but not completely incorporated into Art. 19 of the IHT Statute. See *supra* notes 2 and 3.

18 United States Institute For Peace (R.M. Perito), *Establishing The Rule Of Law In Iraq*, Special Report 103, April 2003; Judge Medhat al-Mahmud, *The Court System in Iraq: A Descriptive Study of Legislation Regulating the Court System in Iraq* (Baghdad, 2004), presented at 'Judicial System in Iraq: Reality & Prospects', Amman, 2–4 October, 2004; International Commission of Jurists, *Iraq and the Rule of Law*, February 1994.

19 Even trials conducted under UN auspices have not always met international standards of fairness. See C. Reiger and M. Wierda, *The Serious Crimes Process In East Timor: In Retrospect* (New York: ICTJ, 2006), at 2–3, 40–41. See also D. Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor* (Honolulu: East-West Center, 2006).

20 Art. 14(1) ICCPR, *supra* note 2.

21 IHT Statute, *supra* note 3. Effective on publication.

22 See e.g. M.A. Newton, 'Legal Authority for the Creation of the Iraqi High Tribunal', in M.P. Scharf and G.S. McNeal (eds), *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (Durham, NC: Carolina Academic Press, 2006) 15–23; M. Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal', 38 *Cornell International Law Journal* (2005) 327. See also Coalition Provisional Authority (CPA) Order 48, 'Delegation of Authority Regarding an Iraqi Special Tribunal', issued 10 December 2003. Iraqi criminal law did not include the offences of genocide, war crimes, and crimes against humanity; by including them, the Iraqi Special Tribunal (IST) Statute effectively amended existing Iraqi criminal law. According to IHL, an occupying power is limited in the changes it can make to the penal laws of the country it occupies. For a discussion of the tribunal's creation, see ICTJ Briefing Paper, *Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, October 2005; available at www.ictj.org/images/content/1/2/123.pdf (visited 22 February 2007).

of the judicial process.²³ The IHT statute contains two articles that render it vulnerable to external intervention. Article 4(4) empowers the Council of Ministers to transfer judges from the Tribunal to the Supreme Judicial Council for any reason, from whence they can be retired or reassigned. Article 33 requires that no member of the Tribunal's staff can have been a member of the Ba'ath party.²⁴ This renders judges ineligible for service based on notification of ineligibility from the Higher National De-Ba'athification Commission, a feared and highly political body.²⁵ The standard contained in Article 33 is much higher than those stipulated by other de-ba'athification procedures, which focus on higher-level party members. To be de-ba'athified involves loss of employment, professional standing and considerable public stigma. There is a third, hidden, weapon that the executive can wield to great effect: the fact that although judicial salaries are paid from the Tribunal budget, the Prime Minister's office controls allowances and access to protection and secure accommodation in the International Zone. In Iraq's current security environment these are powerful — and perhaps life-saving — incentives.²⁶

The Higher National De-Ba'athification Commission has repeatedly intervened in the Tribunal's judicial assignments and removals. Early judicial appointments to the Tribunal appear not to have met the required standards and the Commission has functioned as a sword over the Tribunal's work. De-ba'athification is a highly political process. The Commission has intervened successfully three times in judicial assignments directly related to the *Dujail* trial.²⁷ First was the Commission's attempt to remove 19 court personnel,

23 One study that examined four domestic prosecutions of international crimes concluded that fair and effective trials rested on four fundamental conditions: a workable legal framework; a trained cadre of judges, prosecutors, defenders and investigators; an adequate infrastructure (including courtroom and detention facilities) and most important, a culture of respect for the fairness and impartiality of the process and the rights of the accused. See S.R. Ratner and J.S. Abrams, *Accounting for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2001), 182–183.

24 IHT Statute, *supra* note 3, Art. 33 (varying from the standard terminology used in other de-ba'athification-related instruments by saying, 'No person belonging to the Ba'ath Party may be appointed as a Judge, Investigative Judge, Prosecutor, employee or any of the Tribunal's staff').

25 De-ba'athification procedures established by the Coalition Provision Authority and then the Interim Governing Council focus on the dismissal from public service of individuals who held one of the top four ranks of party membership, all of which are higher than the rank of 'member'. Given party membership was widespread amongst the legal and judicial professions, the standard of Art. 33 is so high as to be almost unimplementable. In reality de-ba'athification is a politicized process which has ignored the high threshold required by international standards before judges can be removed from ongoing cases. In this regard, the ICTJ notified then Iraqi Prime Minister Ibrahim al-Jafaari of the UN Basic Principles on the Independence of the Judiciary in a letter of 14 February 2006. For an explanation of de-ba'athification's legal and political framework see E. Stover, H. Megally and H. Mufti, 'Bremer's Gordian Knot: Transitional Justice and the U.S. Occupation of Iraq', 27 *Human Rights Quarterly* (2005) 830.

26 The situation differs according to judges' place of residence: judges ordinarily living in Kurdistan face fewer barriers in this regard. Judges and staff living in Baghdad are most vulnerable.

27 The information in this paragraph is based on extensive interviews with Tribunal and De-Ba'athification Commission staff in 2006 and 2007, including several individuals affected by de-ba'athification procedures.

including judges and administrative staff, in July 2005. The judges maintained their positions, but administrative staff — including the administrative director — were dismissed.²⁸ Second, the Commission orchestrated the removal of Judge Sa'id al-Hammashi from Trial Chamber One in January 2006, just as he appeared likely to assume the role of presiding judge. Third, the Commission threatened to use de-ba'athification procedures against four Tribunal judges in October 2006. It told the judges that they would be given the opportunity to apply for transfers rather than face the public humiliation of de-ba'athification. Not accidentally, this resulted in the substitution of a member of the *Dujail* trial bench during the trial chamber's final deliberations. A member of the cassation chamber was likewise replaced. Other judges appear to have modified their behaviour or refused positions of prominence for fear of attracting the Commission's attention.²⁹ An internal Tribunal De-Ba'athification Committee was created in 2006 and has been used to consolidate a new power elite inside the Tribunal.

Other political pressures have also eroded judicial independence. Political leaders made public remarks assuming the guilt of the accused throughout the process, and gave the impression that verdicts and sentencing were foregone conclusions. The case's first presiding judge, Rizgar Amin, resigned in the face of mounting public criticism of his 'lenient' courtroom demeanour.³⁰ Al-Hammashi, his nominated replacement, was de-ba'athified. Almost all power relationships inside the Tribunal changed following the death of the first Tribunal President in July 2006, and the leadership's ability (or willingness) to insulate against political pressure decreased. Another stark message was sent by the Prime Minister's swift replacement of Abd Allah al-Amiri, presiding judge in the *Anfal* case, within 48 hours of saying to Saddam Hussein, '[y]ou were not a dictator'.³¹ In short, examples of interference were manifold.

The combined effect of direct interference, political pressure, security issues and illness was an unprecedented degree of turnover within the *Dujail* trial chamber.³² Only one judge from the original bench was present at the final

28 The incident provoked strong US intervention, including the threat to relocate the Tribunal.

29 An example being the decision of the first Chief Investigative Judge not to stand for re-election in the Tribunal judicial elections of 2006.

30 The Minister of Justice, Abd al-Hussein Shandal, directly attacked Judge Rizgar in December 2005; his attacks were subsequently directed at the newly-appointed presiding judge, Rauf Abd al-Rahman. *Al-Hayat*, 5 February 2006. In the same month, the ICTJ was told that members of the executive reportedly threatened to cut judicial allowances, following unfavourable media coverage of the IHT.

31 See P. Beaumont, 'Judge in Saddam Trial Axed in Neutrality Row', *The Guardian*, 20 September 2006. The prosecutor had requested Judge al-Amiri recuse himself in a preceding session on grounds that he was biased in favour of the defence; this comment was the final (and nationally televised) straw. All information available in Baghdad points to direct intervention of the Prime Minister's office to secure Judge al-Amiri's swift reassignment.

32 Many Tribunal judges are over retirement age, and all face extreme stress. There have also been numerous reassignments on the basis of illness and several deaths, including that of the Tribunal President in July 2006.

hearing to resentence Taha Yasin Ramadan on 12 February 2007. There were at least six substitutions³³ and the presiding judge changed three times. These changes must have affected judges' ability to evaluate the case.

There were also reasons to doubt the impartiality of the court. While the trial chamber judges struggled valiantly to maintain impartiality in their demeanour, they did not always succeed. Judge Ra'uf Abd al-Rahman, for example, made a number of prejudicial comments during proceedings, as when he publicly rebuked former Revolutionary Court judge Awwad al-Bandar saying: 'This is not a special court, I am not prosecuting you without fulfilling my conscience, and I will not sentence 148 accused within one hour.'³⁴ Judge Abd al-Rahman's dismissal of the defence's motion for his own recusal was at best poorly handled.³⁵ Evidence of partiality also permeated the trial chamber's judgment. While the judgment often simply accepted complainant testimony without detailed evaluation, it repeatedly discounted defence witness testimony.³⁶ Unwarranted inferences were also drawn from the testimony, and in a number of instances the trial chamber improperly shifted the burden of proof to the defence for key elements of their crimes.³⁷ Instead of rectifying these concerns, the cassation chamber's abbreviated ruling exacerbated them. It was scant and poor in its legal reasoning, and directed the trial chamber to increase the sentence of Taha Yassin Ramadan from life imprisonment to the death penalty without citing any reasons.³⁸

33 One judge recused himself; one resigned, two were de-ba'athified, one switched panels and another died in a car accident. Much of this turnover was hidden from public view. For security reasons, the Tribunal does not release most judges' identities. Although proceedings were televised, of the judges, only the presiding judge was shown.

34 IHT session, 5 June 2006 (a mocking reference to al-Bandar's role in sentencing 148 Dujailis to death as the head of the Revolutionary Court).

35 The motion was immediately dismissed verbally without reasoning by Judge Abd al-Rahman himself in the session of 17 February and with slightly more detail on 28 February. The Trial Chamber addressed this issue in the judgment, but under rules 7 and 8 of the Tribunal's Rules of Procedure and Evidence this matter should have been addressed by the cassation chamber. See Posting of Kevin Jon Heller to Grotian Moment: The Saddam Hussein Trial Blog, 'Comparing the Trial to International Standards of Due Process', http://www.law.case.edu/saddamtrial/entry.asp?entry_id=142 (28 June 2006) (visited 22 February 2007).

36 In one of the rare cases where the court addressed defence witness testimony, the court only did so in an attempt to logically debunk the witness' testimony regarding the existence of weapons caches in the orchards. See Iraqi High Tribunal, Trial Chamber, Case No. 1/C 1/2005, Dujail Case, 5 November 2006 (released 22 November 2006), translated by Human Right Watch and the International Center for Transitional Justice, at 85, 90, 94–95 available at: <http://www.ictj.org/static/MENA/Iraq/DujailVerdict.eng.pdf> (hereinafter *Dujail Trial Judgment*). Unfortunately, the 'logical' conclusion that the court arrived at, that there could not have been weapons caches in the orchards, was not a logical necessity, and as a result only provided a further indication of the court's inclination against the defendants.

37 See *infra* Part 3(C).

38 See IHT, Cassation Chamber, Case No. 29/c/2006, Dujail Case, 26 December 2006, translated by Mizna Management LLC, at 20 (hereinafter *Dujail Cassation Judgment*). The trial chamber found Taha Yassin Ramadan guilty of crimes against humanity, murder, forced displacement, imprisonment, torture and other inhumane acts. Evidence and reasoning on the wilful killing

B. Equality of Arms

Equality of arms is 'at the centre of... criminal procedural guarantees' and '[t]he most important criterion of a fair trial'.³⁹ Yet throughout the course of the *Dujail* trial the IHT placed defendants at a significant disadvantage in relation to the prosecution. It permitted ambiguous charging, limited access to important evidence and denied defendants the full opportunity to contest evidence presented against them.⁴⁰ These problems were exemplified by insufficient charging documents, inadequate security arrangements, failure to gather and disclose exculpatory evidence, late or incomplete disclosure and an impaired opportunity to confront witnesses. Such disparities were particularly damaging to the low-level accused,⁴¹ but they affected fairness for all defendants. The abbreviated appeals process was inadequate to evaluate the complex substantive and procedural issues that arose during the trial.⁴²

It is also important to note, however, that the defence repeatedly failed to use the opportunities afforded to it by the Tribunal. Privately retained counsel would often resort to politicized and unhelpful tactics such as staging walkouts. The Tribunal's own Defence Office was under-resourced and incapable of mounting an effective defence, although some improvements occurred towards the trial's end.

charge was weak. The cassation chamber, without reasoning or rationale, ordered the case returned to the trial chamber to increase Ramadan's sentence for wilful killing from life imprisonment to death. The trial chamber confirmed the death sentence in the worst session of the *Dujail* trial on 12 February 2007.

39 L. Arbour, In the matter of Sentencing of Taha Yassin Ramadan: Application for Leave to Intervene as Amicus Curiae and Application in Intervention as Amicus Curiae of United Nations High Commissioner for Human Rights, § 23, 8 February 2007 (quoting M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn., Kehl am Rhein: N.P. Engel, 2005), at 321.

40 At root was the Tribunal's inability to accept the concept of the defence as an essential partner in the trial process. This is the legacy of a strong historical tendency to view the defence as an unnecessary challenge to the power of the court. Unprofessional behaviour by defence counsel did not help. The Tribunal believed strongly that it had met all fairness requirements in allowing defence counsel, providing counsel for indigent defendants, and permitting them to examine and present witnesses and evidence: this was a significantly greater defence role than in previous decades.

41 The inclusion of four minor Ba'ath Party officials alongside four high-level accused seriously hampered the quality of their defence. They were accorded less time and fewer resources than their high-profile counterparts.

42 The judges in the cassation chamber did not seem as concerned about fairness to the accused. In a 20-page document, the appeal ruling addressed all the defendants' fairness concerns in a short, unreasoned and unsupported paragraph stating: 'As for the other defences, the defendants were given enough guarantees to have fair trials. Each suspect was informed of the kind of accusations filed against him. He was given ample chance to defend himself and to choose his legal advisors and attorneys in person with the assistance of legal counsellors. He was given the chance to interview the defence witnesses. He used his rights to fully defend himself. He was not forced to say what he did not want to say. Then the defence he is using in this regard is rejected too.' *Dujail* Cassation Judgment, *supra* note 38, at 14.

The use of insufficient charging instruments put defendants at a significant disadvantage in preparing their defence. Defences in crimes such as crimes against humanity differ from those available in normal crimes. They are generally based on modes of liability, rather than issues of crime base evidence. For these reasons indictment standards are complex, but well-established under the jurisprudence of the international tribunals.⁴³

The *Dujail* charging process fell far short. The IHT's charging process followed that of traditional Iraqi criminal law, which is a civil law system. This two-step process differs from international processes in terms of the timing of charges, but timing was not the main problem.⁴⁴ Rather, the procedure was insufficiently specific in terms of informing the accused of their alleged roles in the commission of crimes against humanity.

For instance, the referral decision of the chief investigative judge (*qirar al-ihala*) gave only a schematic account of factual allegations with no differentiation between the accused individuals. It did not attempt to specify the role played by each accused or modes of liability under Article 15 of the IHT Statute. A formal charging document (*qirar al-tuhm*, or accusation decision) was not presented until May 2006, at the end of the prosecution case. Additional criminal charges for forced disappearances and other inhumane acts were also added. These charging documents however, lacked sufficient clarity on modes of liability for each crime, generally charging each defendant with the same modes of liability for all the crimes combined, when there was clearly no evidence to support certain forms of liability for certain crimes.⁴⁵ This blanket and generalized charging process violated defendants' rights to be informed promptly,⁴⁶ and in detail of the charge against them,⁴⁶ thus making it very difficult for the accused to adequately defend against the charges.

43 ICTY Judgment, *Kordić and Čerkez* (IT-95-14/2), Appeals Chamber, 17 December 2004, §§ 128–129 (clarifying that the indictment must contain a precise statement of facts and crimes with which the accused is charged and unambiguously state the nature of the alleged responsibility). See also Art. 14(3)(a) ICCPR, *supra* note 2 (noting an accused has a right to be informed promptly and in detail of the charges against him); IHT Statute, *supra* note 3, Art. 19(4)(a) (same); Human Rights Committee Communications No. 1128/2002, *Marques de Marais v. Angola*, § 5.4 and 253/1987, *Kelly v. Jamaica*, § 5.8 (noting that the prompt notice requirement in Art. 14(3)(a) of the ICCPR means that this information must be conveyed as soon as the person is charged with the criminal offence).

44 After investigation has finished cases are referred to the trial chamber on the basis of a referral decision, which contains the factual allegations against each defendant and the legal articles they are alleged to have violated. After hearing of complainants, witnesses, and examining prosecution evidence the trial chamber then draws up a detailed accusation decision containing final charges. The accusation decision is the formal charging instrument. See Iraqi Law on Criminal Proceedings (No. 23 of 1971) § 213(A) Arts 131 and 181. The presentation of the accusation decision after the prosecution evidence was heard implies there should be reasonable time for the defence to prepare.

45 See e.g. Charging instrument against Abd Allah al-Ruwaid, 15 May 2006, generally charging 'commission' under Art. 15(A) for all crimes including wilful killing, and torture, when the prosecution never presented or alluded to evidence that he 'committed' these crimes.

46 See *supra* note 43.

The accused were deprived of vital knowledge on the case against them and forced into the impossible task of preparing for every possible alleged scenario.

The *Dujail* trial was held amidst intense and deepening conflict. The IHT itself is a frequent and high-profile target. The killing of three defence lawyers during the course of the trial shows that the IHT's measures to protect defence counsel were inadequate. While certain security arrangements were offered to defence counsel, too little appears to have been offered too late.⁴⁷ The security situation made it impossible for the defence to conduct its own investigations, particularly in al-Dujail village. Members of the Tribunal's defence office have also had difficulty in making adequate security arrangements. As a result, defendants faced difficulties in retaining not only private counsel, but even court-appointed attorneys.

The defence's inability to conduct investigations could have been mitigated through efforts by the investigative judge to uncover exculpatory evidence. Under the rules governing the IHT, the investigative judge has a duty to gather exculpatory evidence,⁴⁸ and the prosecutor has a duty to disclose this exculpatory evidence to the defence.⁴⁹ However, the dossier did not contain exculpatory evidence, nor is there any indication that the prosecutor fulfilled his duty to disclose exculpatory information.⁵⁰ Even when one defendant explicitly requested the court's assistance in locating the former Revolutionary Court's dossier on the Dujailis who had been tried before it, claiming it to be exculpatory, the IHT was unamenable, and stated it was the duty of the defence to find it.⁵¹ It subsequently emerged that the dossier was in fact in the court's possession.⁵²

Erratic disclosure likewise diminished the defence's ability to contest the evidence. The trial chamber allowed the prosecutor to introduce into evidence a number of documents and exhibits during trial without prior disclosure to the defence. Examples include audio-visual recordings of conversations allegedly between Saddam Hussein and Taha Yasin Ramadan aired during the sessions of 1 March, 24 April and 13 June 2006. Such practices violated the IHT's own rules on disclosure and resulted in frequent complaints of 'trial by

47 After the killing of Sadun al-Janabi in October 2005, defence counsel demanded that they be given a choice of protective personnel (rather than have guards provided by the Ministry of Interior); that they be issued weapons and appropriate licences, and that an impartial investigation be conducted into the killing of al-Janabi. In March 2006, there were delays in paying the guards assigned to them by the Ministry of the Interior, and there was reportedly still no offer to relocate outside of Iraq. A third defence counsel was murdered in June of 2006.

48 Rules of Procedure and Gathering of Evidence with Regard to the Supreme Iraq Criminal Tribunal (2005), Rule 23(2) (hereinafter IHT Rules).

49 IHT Rules, *supra* note 48, Rule 42(2).

50 An author specifically discussed this question with investigative judges before and during the trial phase.

51 See IHT session, 6 April 2006. The trial chamber stated it disclosed this evidence in a timely manner to the accused on 19 June 2006. See *Dujail* Trial Judgment, *supra* note 36, at 60–61. Yet this was session 35 of the 41-session trial.

52 See Human Rights Watch, *Judging Dujail: the First Trial Before the Iraqi High Tribunal*, Vol. 18, No. 9(E), November 2006, at 53.

ambush.⁵³ There were also examples of ineffective disclosure. For example, of the dossiers given to defence counsel prior to trial, one-third of the contents were illegible.

The IHT also limited the defences' ability to contest evidence by depriving them of opportunities to confront the witnesses against them. While about half of complainants appeared in court, another 28 were deemed 'unavailable' and their statements were read into the record without reservation. These statements had been taken by the investigative judge without the presence of counsel for the accused; some of this testimony went directly to acts of the accused.⁵⁴

Tribunal practices concerning witness confidentiality also limited witness confrontation. The identities of the majority of complainants and witnesses were disclosed only hours in advance of their being called, making it impossible for the defence to prepare adequately for cross-examination.⁵⁵

The substantive and procedural flaws in the *Dujail* case could have been addressed by a robust appeals process. Instead, however, cassation chamber reacted to mounting executive pressure and issued its final judgment with worrying speed. The haste of the cassation chamber's actions appear to have impinged accuseds' right to time and adequate facilities to prepare a defence. The trial chamber announced the verdicts and sentences in the *Dujail* case on 5 November 2006, but released its written opinion only on 22 November — more than halfway through the 30-day appeal period. This gave the defence only 11 days to study the judgment before submitting their appeals on 3 December. Subsequent defence submissions were accepted on 17 December. The cassation chamber announced its final judgment just nine days later. Unlike the trial chamber judgment, where judges had struggled hard with the unfamiliar task of producing a serious document in the tradition of international tribunal judgments, the cassation ruling was remarkable primarily for its absence of reasoning. It was particularly notable for the fact that, without discussion of reasoning or evidence, the cassation chamber ordered that Taha Yasin Ramadan's sentence be increased from life imprisonment to the death penalty.⁵⁶

53 See IHT Rules, *supra* note 48, Rule 40.

54 We have researched this point extensively, including in discussion with the Chief Investigative Judge and defence lawyers. Defence counsel were present during the questioning of their own accused, but do not appear to have participated in any other parts of the investigation.

55 Confidentiality measures may be valuable and in Iraq there may be good reasons for their application. Yet the measures appeared to have been applied in a blanket manner, rather than on a case-by-case basis.

56 *Dujail* Cassation Judgment, *supra* note 38, at 20. To many observers (unaware of last-minute changes to the composition of the trial chamber) the cassation chamber judgment marked an important but unwelcome boundary: between a tribunal struggling in good faith but limited capacity to deliver a judicial verdict, and the slide into a purely political process.

C. Evidentiary Gaps and Analytical Flaws in the Judgment

Besides these concerns about fairness, there were also a number of evidentiary gaps in the case as presented by the prosecutor. While evidence on the crime base was strong, there was insufficient evidence to show that many of the accused had the requisite criminal intent or knowledge about the crimes committed.⁵⁷ This meant that the court was only able to convict through making unsupported inferences. Even Saddam Hussein's liability under command responsibility — arguably the prosecution's strongest case against Hussein — rested on assumptions of knowledge drawn from his position, rather than from evidence of actual or constructive knowledge at the time when the crimes were committed.⁵⁸

Nor was there any contextual evidence to show how the various institutions implicated usually functioned as part of Saddam Hussein's regime. An example of this lack of contextual evidence was the conviction of Awad Al-Bandar, chief judge of the Revolutionary Court. The trial chamber held that the trial of 148 Dujailis before the Revolutionary Court was a sham, and that the judgment amounted to an execution order. But in making that finding, it did not call evidence on the role the Revolutionary Court *usually* played within Saddam Hussein's regime. Instead, it sought to conclude that *on this occasion* there had been a sham trial, an issue that is far harder to prove to the required standard.

The case also lacked linkage evidence connecting the high-level accused to the crimes charged.⁵⁹ The case against Taha Yassin Ramadan was particularly weak. Instead of clearly presenting evidence on the role of the Popular Army in killing and torture, and proving the effective control of Taha Yassin Ramadan over his subordinates, the court held that under Saddam's regime, killing and

57 See e.g. *Dujail Trial Judgment*, *supra* note 36, at 66–67 (unconvincing attempt to impute Bandar's knowledge); *ibid.* at 108–109 (asserting that Saddam Hussein knew that the probable result of his order would be killing without any evidence); *ibid.* at 218, 222–223, 225–227 (trying to assert requisite knowledge of Taha Yassin Ramadan without evidence); *ibid.* at 250 (stating that although everyone is entitled to the presumption of innocence, based on the evidence in the case, especially Abd Allah al-Ruwaid's report, the court 'cannot presume good intent'); *ibid.* at 248 (attempting to assert, without evidence, Abd Allah al-Ruwaid's knowledge that torture and killing were the probable result of his actions); *ibid.* at 262 (same for Ali Dayih Ali); *ibid.* at 275 (same for Mizher al-Ruwaid).

58 See e.g. *Dujail Trial Judgment*, *supra* note 36, at 105, and 111–112. There is evidence in the dossier to indicate that Hussein may not have known of these criminal acts when they were committed. The fact that a subsequent report was submitted to him outlining what had taken place in Dujail suggests that there was a need for such a report because before that time Hussein had been unaware of those activities. There is also evidence in the dossier that once Hussein became aware of the detention and exile of many of the Dujailis, he released them.

59 System crimes require a detailed exploration of the system itself, and not merely its results. The results are manifested in the underlying offences that constitute what is called the 'crime base' (e.g. murder, torture, rape, deportation, etc.). The testimony of the complainants and the documentary evidence of the *Dujail* case succeeded in establishing the crime base, but often not the responsibility of the accused for the crime through evidence of his role in the overall system.

torture were the probable results of any arrests carried out by the Popular Army. The judgment simply declared that '[n]o Iraqi had any doubt about that reality'.⁶⁰ The result is that the court failed to translate 'what all Iraqis knew' into legally justifiable facts based on evidence. It inappropriately used inferences to fill in important gaps so as to achieve the desired outcome, which was the conviction of high-level accused.

When the IHT assumed and inferred facts, knowledge and system evidence it changed the burden of proof and subverted the presumption of innocence.⁶¹ The presumption of innocence means that every element of each charge must be proven to the required standard.⁶² By using impermissible inferences to prove elements of a crime without evidentiary support, the *Dujail* trial chamber presumed aspects of the defendant's guilt, shifting the burden to the defendant to provide evidence of his innocence. This burden shifting violated the accused's right to the presumption of innocence. Although the court rhetorically used the 'beyond a reasonable doubt' standard, in reality it fell considerably short of this and the 'innermost conviction' standard required in Iraqi criminal trials.

4. Conclusion

The *Dujail* trial was an opportunity to provide a new paradigm of Iraqi justice, based on the rule of law. But despite good intentions — and genuine efforts by many judges — the proceedings were marred by political interventions that damaged the Tribunal's independence and undermined the final result. Fairness and credibility were tainted by a host of political, capacity and procedural issues: many intensified sharply after the Tribunal's leadership changed in mid-2006. While the security situation in Iraq contributed to many of the Tribunal's problems, they did not determine the issues discussed in this article. Even given its very difficult operating environment, the IHT could have and should have done better. And the botched execution of Saddam Hussein undid in moments what the trial chamber had laboured hard to achieve.

60 *Dujail* Trial Judgment, *supra* note 36, at 248.

61 According to the IHT statute all accused are presumed innocent until proven guilty. IHT Statute, *supra* note 3, Art. 19(2).

62 English-language commentators have been confused over the burden of proof the Tribunal would be relying upon to support its findings. This confusion stems from an error in a widely-circulated English version of the Iraqi Criminal Procedural Code, in which 'conviction' (*iqtinā*) is mistranslated as 'satisfaction'. See Iraqi Law on Criminal Proceedings (No. 23 of 1971), Art. 213(A). Tribunal judges stated at the opening of the *Dujail* case that they would be using the standard civil law burden of proof of *intime conviction du juge*. However, to make the matter more confusing, in the Arabic written judgment the trial chamber has in fact used the language of 'beyond reasonable doubt'. For examples of the court's use of reasonable doubt language see, *Dujail* Trial Judgment, *supra* note 36, at 53, 65, 99, 104, 188, 215, 230, 246, 261 and 277.

The key now is to ensure that the failures of the *Dujail* trial are not repeated. Many may look to the Tribunal's second trial, al-Anfal, for a more satisfactory and robust result. The Tribunal plans numerous other trials to come. The failures in capacity and political interference at the IHT have significant consequences for internationals as well as Iraqis. Both still have a lot to learn about assisting or conducting impartial, fair and successful prosecutions of international crimes at the domestic level. It is vital that Iraqis and internationals absorb the lessons of the *Dujail* trial, and ensure that all its hopes and efforts count for something. The stakes are too important not to try.